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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 76

THE ALLEGHENY LUDLUM STEEL CORPORATION,
Appellant,

vs.

WILLIAM J. KELLEY AND H. MYRON LEWIS, CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK
FOR THE COUNTY OF CHAUTAUQUA

JOHN G. BUCHANAN,
WELLES V. MOOT,
Counsel for Appellant.

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STATUTES CITED

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Labor Law of the State of New York, Article 20, L. 1937, c. 43, Section 1, as amended (30 McKinney's Consolidated Laws, Sections 700-716, effective May 20, 1937) 2
National Labor Relations Act (49 Stat. 453, 29 U. S. C. 151) 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1048

THE ALLEGHENY LUDLUM STEEL CORPORATION,
Appellant,

vs.

WILLIAM J. KELLEY AND H. MYRON LEWIS, CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK,
Appellees

STATEMENT OF BASIS UPON WHICH APPELLANT CONTENDS THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT APPEALED FROM.

Pursuant to Rule 12, paragraph 1, of the Supreme Court of the United States, the applicant for the allowance of an appeal in the above entitled case files its statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question, as follows:

I

The statutory provision believed to sustain the jurisdiction is Section 237(a) of the Judicial Code of the United States (U. S. C., Title 28, § 344(a)).

II

The statute of the State, the validity of which is involved, is the Labor Law of the State of New York, Article 20, L. 1937, c. 443, § 1, as amended, 30 McKinney's Consolidated Laws §§ 700-716, effective May 20, 1937, and particularly Section 705 thereof, providing (inter alia) that the State Labor Relations Board shall decide the unit appropriate for the purposes of collective bargaining and whenever it is alleged by an employee or an employer that there is a question (with an exception not material in this case) concerning the representation of employees, shall investigate such question and certify the name or names of the representatives who have been designated or selected. The validity of the said statute is involved insofar as it applies to employees engaged in interstate commerce. A copy of the said statute is attached hereto as Appendix A.

III

The date of the judgment sought to be reviewed was November 30, 1945, and the date upon which the application for appeal is presented is February 16, 1946.

IV

The appellant on April 14, 1944, served a complaint in the Supreme Court of the State of New York for the County of Chautauqua (R. 24). In this complaint the appellant alleged (inter alia) substantially as follows:

The appellant owned a steel mill and leased a second steel mill in Dunkirk, Chautauqua County, New York, and operated the said mills (hereinafter referred to as its plant) (R. 24-25). The appellees constituted the State Labor Relations Board of the State of New York (R. 25). The Foremen's Association of America, Allegheny Ludlum

Steel Corporation Chapter No. 58, was a labor union and its membership was limited to supervisory employees whose work consisted solely of supervising other employees of the appellant hired in connection with the operation of its Dunkirk plant (R. 27-28). The said union filed its petition with the said Labor Relations Board, alleging that a question or controversy had arisen concerning the representation of supervisory employees of the appellant, and requesting that the Board certify the said union as the appropriate representative for collective bargaining by such supervisory employees of the appellant at its said plant (R. 28-29). The appellant duly moved that said petition be dismissed upon the ground that the Labor Relations Board of the State of New York had no jurisdiction in the premises and because the said union was not an appropriate collective bargaining unit (R. 30). The appellees refused to agree with the appellant that its employees at its said Dunkirk plant were subject to and protected by the provisions of the National Labor Relations Act, and the appellees continued wrongfully to assert jurisdiction of the matters covered by the said petition (R. 30-31). Approximately 95% in value of the products shipped from said Dunkirk plant were shipped to points outside New York and 86% in value of raw materials purchased for use in the plant were received from outside New York and of materials partially fabricated at other plants of the corporation and shipped to said Dunkirk plant for further fabrication over 85% in value were shipped from outside New York, and the appellant in operating its said plant was engaged in interstate commerce (R. 31-32). Pursuant to the National Labor Relations Act, 49 Stat. 453, 29 U. S. C. §§ 151 ff. the National Labor Relations Board had the sole power to determine appropriate bargaining units among the employees of the appellant at its said Dunkirk plant, whether said employees were or were not employed in a supervisory capacity (R. 34). It was the settled policy

of the National Labor Relations Board to refuse to certify a union of supervisory employees of such a character as the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, as a bargaining agent, because the said Board did not regard a bargaining unit consisting solely of supervisory employees, whose only work was to supervise other employees, as an appropriate bargaining unit, and, except under exceptional circumstances, which did not obtain in the premises, certification of all unions of supervisory employees had been refused by the said Board (R. 34-36). The said National Labor Relations Board had, in a case entitled "Matter of Allegheny Ludlum Steel Corporation and Steel Workers' Organizing Committee, Case No. III-R-411," exercised jurisdiction over the appellant and certain of the employees of said Dunkirk mills of the appellant and certified a collective bargaining representative for said employees, which certification was still in full force and effect (R. 36). By virtue of the Acts of Congress and the acts and decisions of the National Labor Relations Board Congress and the Board had assumed jurisdiction over the entire field of controversies within which the present controversy fell (R. 37). As to all such matters of jurisdiction of the National Labor Relations Board was exclusive and the Labor Relations Board of the State of New York had no jurisdiction to entertain the said petition or to make any determination of the questions and issues raised and presented by it and presently before the State Labor Relations Board (R. 37-38). By reason of the threatened continuance of said proceedings before the New York State Labor Relations Board the appellant was threatened with the issuance of an order by the appellees, pursuant to which an election to determine a bargaining unit for the said supervisory employees of the appellant would be held, and the holding of such an election and the issuance of such order would cause irreparable harm and damage to the

appellant (R. 39). Such action of the appellees destroyed the harmonious relations between the appellant and its supervisory employees, defeated the purpose of the Act by causing instead of preventing labor disputes, and placed the appellant in a position of being ordered to perform actions and to conduct itself in relation to its supervisory employees in a manner directly in conflict with the declared policy of the National Labor Relations Board, all of which impaired the war effort (R. 40). The appellant was threatened with substantial and irreparable injury (inter alia) because it might thereafter be subjected to conflicting rulings of the State Labor Relations Board and the National Labor Relations Board as regards its relations with its said supervisory employees and with the said union and might be directed by the State Labor Relations Board to do that which was illegal under the National Labor Relations Act and the rulings of the National Labor Relations Board (R. 40-42). The appellant was advised and believed that the actions of the New York State Labor Relations Board in the premises and the provisions of the New York State Labor Relations Act, insofar as the same might apply to the appellant and its relation to its supervisory employees, were void, because in violation of the provisions of the Constitution of the United States, since that Act, as the said State Board threatened to apply it in this instance, denied due process of law and violated Article I, Section 8, giving the Federal Government control of interstate commerce (R. 42-43). The appellant, in view of the inapplicability of the provisions of the New York State Labor Relations Act to it and to its relations with its said supervisory employees, was bringing this action pursuant to Section 473 of the Civil Practice Act, L. 1920, c. 925, Article 35, § 473, to obtain a judicial determination of the jurisdiction of the Labor Relations Board of the State of New York in the premises (R. 43-44).

The appellant prayed that a declaratory judgment be made and entered adjudging (inter alia) that the appellees had no jurisdiction over the appellant or its supervisory employees at its Dunkirk plant (R. 47); that the appellees might not properly certify the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, as the appropriate bargaining unit for the foremen or other supervisory employees of the appellant at its said plant (R. 47-48); that the appellees had no jurisdiction to hold an election or to attempt to hold an election for the purpose of determining a representative of the said supervisory employees to bargain collectively with the appellant or to order the appellant to bargain collectively with any such representative (R. 48-49); that the appellees be restrained and enjoined from holding an election or attempting to hold an election for the purpose of determining a representative of the said supervisory employees to bargain collectively with the appellant, or from taking any other action in connection with the appellant or its employees under the provisions of the New York State Labor Relations Act (R. 49-50).

The stage in the proceedings in the court of first instance at which the federal questions sought to be reviewed were raised was in paragraph 21 of the complaint summarized in the previous paragraph, where it was pleaded (R. 42-43) that the provisions of the New York State Labor Relations Act, insofar as the same might apply to the appellant and its relation to its supervisory employees, were void because in violation of the provisions of the Constitution of the United States, since that Act, as the New York State Labor Relations Board threatened to apply it in this instance, denied due process of law and violated Article I, Section 8, giving the Federal Government control of interstate commerce. This allegation was denied by the appellees in paragraph 1 of their amended answer (R. 57).

The appellees gave notice that upon the complaint and amended answer they would move the court for an order granting judgment dismissing the complaint on the ground that on the face of the pleadings the appellees were entitled to the relief requested in their amended answer, and on the ground that the complaint did not state facts sufficient to constitute a cause of action (R. 168-169); and further notice that upon the complaint and amended answer and annexed affidavits they would move the court for an order dismissing the complaint and directing that judgment to that effect be entered in their favor on the ground that the action had no merit (R. 169-170).

It was stipulated that the C. I. O. had been certified by the National Labor Relations Board as collective bargaining representative of appellant's employees, other than foremen, employed at its five plants, including plants at Brackenridge and West Leechburg, Pennsylvania, and Dunkirk, New York, and a single contract had been made covering such employees, other than foremen (R. 248-249). It was further stipulated that the court might take cognizance of all decisions of the National Labor Relations Board and the State Labor Relations Board (R. 250).

Mr. Justice Hinkley of the Supreme Court ordered that the motions of the appellees be granted in all respects and that the complaint be dismissed upon the merits and that judgment be entered in favor of the appellees and against the appellant (R. 17-19). This is the way in which the federal questions were passed upon by the court of first instance. It is believed that the places in the record where the matter appears, to which we have referred, will support the assertion that the ruling of the court was of a nature to bring the case within the statutory provision believed to confer jurisdiction on the Supeme Court of the United States.

A copy of the opinion of Mr. Justice Hinkley, delivered upon the rendering of his judgment (R. 252-270), is appended hereto as Appendix B. The rulings of the court of first instance are illustrated by the following excerpts from its opinion:

> "This decision, by agreement of counsel, is not only determinative of defendants' motion to dismiss the complaint under Rules 112 and 113 of the General Rules of Practice but also of the trial of the Equity action itself. There are no disputed questions of fact but only questions of law (R. 252).
>
> * * * * * * *
>
> "Plaintiff contends that the defendants are without jurisdiction to act in the matter. This contention is based upon the fact that the plaintiff is engaged in interstate commerce and that the jurisdiction rests exclusively with the National Labor Relations Board by virtue of the National Labor Relations Act (49 Stat. 449, U. S. Code, Title 29, Chapter 7, U. S. C. 151). Plaintiff also contends that if the defendants have jurisdiction under ordinary circumstances that they are not authorized to receive and act upon the petition of the said Foremen's Union because of a definite policy adopted by the National Labor Relations Board decreeing that a unit composed entirely, as this one is, of foremen or those occupying a supervisory position with the Company is not an appropriate unit for collective bargaining.
>
> "Defendants contend that they are vested with jurisdiction; that they were required to act; that they are not controlled by any policy of The National Labor Relations Board, and that the Union in question is an appropriate bargaining agent for collective bargaining (R. 255-257).
>
> * * * * * *
>
> "The Court is not called upon nor does it desire to express its opinion of the logic or reasoning or right

or wrong of the conflict of policy of the Federal and State Labor Relations Boards. In the absence of a definite intent of statutory regulation and in the further absence of judicial precedent, the Court cannot properly decree that in this instance the defendants are without jurisdiction to act simply because the National Labor Relations Board would not act under similar circumstances. * * *. (R. 264-265.)

"The Court cannot read into the legislation upon labor relations any intent upon the part of Congress to cover the whole field of employer and employee relations in industrial plants engaged in interstate commerce by the Act of Congress in creating The National Labor Relations Board. If so, then state action would be precluded. (Napier vs. Atlantic Coast Line, 272 U. S., 605, at 613; Oregon-Washington R. & N. Co. vs. Washington, 270 U. S., 87.) Congress cannot be held to have intended to supercede or suspend the exercise of reserved powers of a State, even when that may be done, unless and except so far as its purpose to do so is clearly manifested. (Illinois Central R. Co. vs. Public Utilities Com., 245 U. S., 493, 510. Approved in Welch Co. vs. New Hampshire, 306 U. S., 79, 85.)

"Here we have, in the language of Chief Justice Stone (Cloverleaf vs. Patterson, 315 U. S., 148 at 170 dissenting opinion) an unexercised discretionary power given by Congress to a Federal Board as a means of regulating interstate commerce, when the full exercise of its authority would conflict with an assertion of the State power. But only in a case where the intention of Congress to give to the Federal Board exclusive control over the entire field is clearly manifested can the power of the State to act be superseded. (N. W. Bell Tel. Co. vs. Ry. Commission, 297 U. S., 471.) In the absence of such clear intention it cannot be said that the failure of the Federal Board to exercise its full power is in effect a controlling administrative ruling that no further regulation by either Federal or State government is proper or needful.

"It follows that defendants' motion to dismiss the plaintiff's complaint under Rules 112 and 113 must be granted and judgment entered in favor of defendants dismissing plaintiff's complaint upon the merits and not as matter of discretion." (R. 266-269.)

V

The appellant, on October 28, 1944, filed and served upon the attorney for the appellees a notice of appeal to the Appellate Division of the Supreme Court for the Fourth Department from the order made at the Special Term for the County of Chautauqua and the judgment entered thereon (R. 2-6). No assignments of error are required or employed in appeals in the State of New York. The appeal in itself raised the federal questions sought to be reviewed, which had been passed upon by the court of first instance.

The said Appellate Division, on May 1, 1945, passed upon the federal questions sought to be reviewed by unanimously ordering that the judgment and order appealed from be affirmed with costs (R. 286-289). No opinion was handed down (R. 290-291). The judgment of affirmance was entered in the office of the Clerk of Chautauqua County (R. 282-285).

The appellant, on June 6, 1945, filed and served upon the attorney for the appellees a notice of appeal to the Court of Appeals (R. 277-281). The appeal was taken as of right, pursuant to the provisions of subdivision 1 of Section 588 of the Civil Practice Act (added by L. 1942, c. 297), the appellant "relying upon questions herein raised involving the construction of the Constitution of the United States of America" (R. 278). The order of the Appellate Division being unanimous, the appeal under the section referred to lay as of right only because the construction of the Constitution was directly involved. To use

the language of the Court of Appeals in *People* v. *Lynch*, 262 N. Y. 1 (1933), at p. 4:

> "An appeal upon the ground asserted here must present to us directly and primarily an issue determinable only by our construction of the Constitution."

The appeal would have been dismissed if the constitutional questions had not been the sole questions involved in the appeal. *Lewis* v. *Board of Education*, 275 N. Y. 480 (1937).

The Court of Appeals, on November 30, 1945, passed upon the federal questions sought to be reviewed by ordering and adjudging that the judgment of the Appellate Division of the Supreme Court appealed from be affirmed, with costs, and that the records in the case, and the proceedings in the Court of Appeals, be remitted to the Supreme Court, there to be proceeded upon according to law (R. ——). No opinion was delivered by the Court of Appeals upon the rendering of its judgment.

The order and judgment of the Court of Appeals was made the order and judgment of the Supreme Court of the State of New York for the County of Chautauqua by order of Parton Swift, Justice of the Supreme Court, on December 26, 1945, (R. ——), and judgment was entered thereon in the Supreme Court of the State of New York for Chautauqua County on December 28, 1945 (R. ——).

VI

The grounds upon which it is contended that the questions involved are substantial are as follows:

The case involves a question of great importance which has not yet been determined by the Supreme Court of the United States.

The National Labor Relations Act provides that the National Labor Relations Board shall decide whether, in

order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of the Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof; and that whenever a question affecting commerce among the several States arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties the name or names of the representatives that have been designated or selected. A State labor relations act provides that a State board shall decide in each case the unit appropriate for the purposes of collective bargaining (except where the majority of employees of a particular craft shall decide that such craft is the appropriate unit), and shall investigate any question or controversy concerning the representation of employees and certify the name or names of the representatives who have been designated or selected. Is this provision of the State act, insofar as it is applied to employees engaged in interstate commerce, repugnant to the commerce clause of the Constitution and the National Labor Relations Act?

In the case at bar the question may be more narrowly stated as a question whether the State statute as so applied is repugnant to the commerce clause and the National Labor Relations Act where the National Labor Relations Board, pursuant to the said Act, had already certified a representative for the purposes of collective bargaining for other employees of the employer at the same plant as the employees here involved.

Is the State statute as so applied repugnant to the commerce clause and the National Labor Relations Act where the National Labor Relations Board had expressed a policy against recognizing supervisory employees as constituting an appropriate collective bargaining unit, but the State stat-

ute is held to authorize the State Board to recognize such employees as constituting such a unit? After the decision in the court of first instance the National Labor Relations Board expressed in later cases a change in this policy. It is believed, however, that the question is still implicitly involved, because the later decisions of the National Labor Relations Board may be reversed and because, if they are not reversed, the question of policy should be one for the National Labor Relations Board and not for State labor relations boards to determine.

VII

The cases believed to sustain jurisdiction are briefly discussed below:

Propriety of Appeal

Railway Mail Association v. *Corsi*, 326 U. S. 88, shows that an appeal from a New York State court declaratory judgment proceeding in a case like the one at bar presents a justiciable "case or controversy" under Sections 1 and 2 of Article III of the Federal Constitution. The conflicting contentions of the parties in this case as to the validity of the State statute as hereby applied present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. Legal rights asserted by appellant are threatened with imminent invasion by appellees and will be directly affected to a specific and substantial degree by decision of the questions of law. See also *Nashville, etc., Ry. Co.* v. *Wallace*, 288 U. S. 249; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227.

In the State courts the appellant distinctly insisted that the New York State Labor Relations Act, insofar as the same might apply to the appellant and its relation to its supervisory employees, was void, because in conflict with the

commerce clause of the Constitution (R., ff. 42-43). The courts did not accede to the insistence, but applied and enforced the statute. That was an affirmation of its validity when so applied. That the statute was not claimed to be invalid in toto and for every purpose does not matter. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288-289; *Fiske* v. *Kansas*, 274 U. S. 380, 385; *United States* v. *County of Allegheny*, 322 U. S. 174, 192.

The Supreme Court of the State of New York in its opinion based its decision on the ground that it could not "read into the legislation upon labor relations any intent upon the part of Congress to cover the whole field of employer and employee relations in industrial plants engaged in interstate commerce by the act of Congress in creating the National Labor Relations Board" (R., f. 266). But the question as to the construction of the Act of Congress is a Federal question, to be determined by the Supreme Court of the United States. *Cf. Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483. And when the State court construed the Act of Congress as not occupying the field of collective bargaining units for employees engaged in interstate commerce, a statute of the State necessarily was sustained against a contention that its application to the circumstances violated the provisions of the Constitution. So the Supreme Court of the United States has jurisdiction under § 237 (a) of the Judicial Code, as amended. *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 97; *Savage* v. *Jones*, 225 U. S. 501, 519; *Missouri Pacific R. R. Co.* v. *Porter*, 273 U. S. 341, 343; *United States* v. *County of Allegheny*, 322 U. S. 174, 192.

It was admitted that the appellant and its employees were subject to the National Labor Relations Act. The State courts upheld the order of the State board because the Federal board had not undertaken, so far as supervisory employees were concerned, to exercise the jurisdiction which

that Act conferred on it. Under such circumstances the decision upholding the order of the State board is one in favor of the validity of the State statute as so applied and may be reviewed by the Supreme Court of the United States upon appeal. *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 745.

Substantiality of Questions Involved

In *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, the Court held that an order of a State board that a union cease and desist from mass picketing, threatening employees, obstructing or interfering with factory entrances or the free use of public streets, roads and sidewalks, and picketing the homes of employees, which were unfair labor practices under the Wisconsin Employment Peace Act, was not unconstitutional as being repugnant to the National Labor Relations Act. The Court pointed out that Congress had not made such employee and union conduct as was involved in that case subject to regulation by the Federal Board, and said that it would not lightly infer that Congress by the mere passage of a federal Act had impaired the traditional sovereignty of the States over such local matters as public safety and order and the use of streets and highways (p. 749). The Court added, however, (p. 751):

> "If the order of the state Board affected the status of the employees, or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise."

It is submitted that the case at bar presents such "a distinctly different question" of great importance, affecting the status of employees in the matter of collective bargaining rights.

Hill v. *Florida*, 325 U. S. 538, foreshadows the case at bar. The Court found it necessary to decide in that case whether a Florida statute regulating labor union activities had been applied in a manner which brought it into irreconcilable conflict with the collective bargaining regulations of the National Labor Relations Act. The Florida court had held valid a provision of the Florida statute that no one should be licensed as a business agent of a labor union who had not been a citizen of the United States for more than ten years, who had been convicted of a felony, or who was not a person of good moral character. For failure to comply with another provision requiring every labor union operating in the State to file a written report with the Secretary of State, disclosing its name, the location of its offices, and the names and addresses of its officers, a union had been enjoined from functioning as a labor union. Another provision made it a misdemeanor for any person or labor organization to violate the statute. The Supreme Court of the United States held that the National Labor Relations Act and the Florida act, as here applied, could not "move freely within the orbits of their respective purposes without impinging upon one another" (p. 543), and accordingly reversed the decree of the Florida court.

It is submitted that in principle the decision of the New York courts in the case at bar is in conflict with the case just cited. It is obvious that the National Labor Relations Board and the New York State Labor Relations Board cannot both decide the unit appropriate for the purposes of collective bargaining for employees of the appellant engaged in interstate commerce at the same plant "without impinging upon one another." If a demonstration of the conflict of the collective bargaining regulations of the State statute with the regulations of the Act of Congress were necessary, the conflict would be shown by the fact that the latter (§9

(b)) confines the National Labor Relations Board, in deciding the unit appropriate for the purposes of collective bargaining, to "the employee unit, craft unit, plant unit, or subdivision thereof," whereas the New York statute (§705(2)) permits the New York board to decide that the unit shall be "the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining." The conflict, moreover, is apparent from the fact that when the National Labor Relations Board certified a representative for purposes of collective bargaining for certain employees of the appellant it had a policy against recognizing supervisory employees as constituting an appropriate collective bargaining unit, while the New York board had no such policy.

It is believed that the following cases also sustain the contention that the questions involved are substantial:

Gibbons v. *Ogden*, 9 Wheat. 1, 209-211;

Gulf, etc. Ry. Co. v. *Hefley*, 158 U. S. 98, 104;

Northern Pacific Ry. Co. v. *State of Washington*, 222 U. S. 370, 378-379;

Second Employers' Liability Cases, 223 U. S. 1, 53-55;

Chicago, etc. Ry. Co. v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426, 435;

Adams Express Co. v. *Croninger*, 226 U. S. 491, 504-508;

Erie R. R. Co. v. *People of the State of New York*, 233 U. S. 671, 681-683;

Southern Ry. Co. v. *Railroad Commission of Indiana*, 236 U. S. 439, 446-447;

Charleston etc. Ry. Co. v. *Varnville Furniture Co.*, 237 U. S. 597, 604;

Pennsylvania R. R. Co. v. *Public Service Commission of the Commonwealth of Pennsylvania,* 250 U. S. 566, 569;

Postal Telegraph-Cable Co. v. *Warren-Godwin Lumber Co.,* 251 U. S. 27, 30-31;

Missouri Pacific R. R. Co. v. *Stroud,* 267 U. S. 404, 408;

Oregon-Washington R. R. & Navigation Co. v. *State of Washington,* 270 U. S. 87, 102-103;

Napier v. *Atlantic Coast Line R. R. Co.,* 272 U. S. 605, 612-613;

Missouri Pacific R. R. Co. v. *Porter,* 273 U. S. 341, 345-346;

Illinois Natural Gas Co. v. *Central Illinois Public Service Co.,* 314 U. S. 498, 510;

Cloverleaf Butter Co. v. *Patterson,* 315 U. S. 148, 169.

Dated: February 19, 1946.

Respectfully submitted,

JOHN G. BUCHANAN,
WELLES V. MOOT,
Counsel for Appellant.

APPENDIX A

New York State Labor Relations Act

CHAPTER 443 OF THE LAWS OF 1937, ARTICLE 20 OF THE LABOR LAW AS AMENDED

AN ACT to amend the labor law, in relation to establishing a labor relations board to promote equality of bargaining power between employer and employee and to diminish the causes of industrial disputes by encouraging collective bargaining, and making an appropriation to the department of labor.

Became a law May 20, 1937, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

ARTICLE 20

NEW YORK STATE LABOR RELATIONS ACT

Section 700. Findings and policy.
701. Definitions.
702. Labor relations board.
703. Rights of employees.
704. Unfair labor practices.
705. Representatives and elections.
706. Prevention of unfair labor practices.
707. Judicial review.
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§ 700. *Findings and policy.* The economic necessity for employees to possess full freedom of association, actual liberty of contract and bargaining power equal to that of their employers, who are frequently organized in corporate or other forms of association, has long been sanctioned by public opinion, and recognized and affirmed by legislatures and the highest courts. As the modern industrial system has progressed, there has developed between and among employees and employers an ever greater economic interdependence and community of interest which have become matters of vital public concern. Employers and employees have recognized that the peaceable practice and wholesome development of that relationship and interest are materially aided by the general adoption and advancement of the procedure and practice of bargaining collectively as between equals. It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining, substantially and adversely affect the interest of employees, other employers, and the public in general. Such denial creates variations and instability in competitive wage rates and working conditions within and between industries and between employees and employers engaged in such industries, and by depressing the purchasing power of wage earners and the profits of business, and tends (a) to produce and aggravate recurrent business depressions, (b) to increase the disparity between production and consumption, (c) to create unemployment with its attendant dangers to the health, peace and morale of the people, and (d) to increase public and private expenditures for relief of the needy and the unemployed.

When some employers deny the right of employees to full freedom of association and organization, and refuse to recognize the practice and procedure of collective bargaining, their actions lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the

public safety and welfare, and frequently endanger the public health.

Experience has proved that protection by law of the right of employees to organize and bargain collectively, removes certain recognized sources of industrial strife and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and tends to restore equality of bargaining power between and among employers and employees, thereby advancing the interests of employers as well as employees.

In the interpretation and application of this article, and otherwise, it is hereby declared to be the public policy of the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint or coercion of their employers.

All the provisions of this article shall be liberally construed for the accomplishment of this purpose.

This article shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state. (As amended by Chapter 689 of the Laws of 1940.)

1. The term "person" includes one or more individuals,

§ 701. *Definitions.* When used in this article:

1. The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

2. The term "employer" includes any person acting on behalf of or in the interest of an employer, directly or indirectly, with or without his knowledge, but a labor organization or any officer or agent thereof shall only be considered an employer with respect to individuals employed by such organization.

3. The term "employees" includes but is not restricted to any individual employed by a labor organization, any

individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; and shall not be limited to the employees of a particular employer, unless the article explicitly states otherwise, but shall not include any individual employed by his parent or spouse or in the domestic service of any person in his home, or any individuals employed only for the duration of a labor dispute, or any individuals employed as farm laborers.

4. The term "representatives" includes a labor organization or an individual whether or not employed by the employer of those whom he represents.

5. The term "labor organization" means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining, or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection and which is not a company union as defined herein.

6. The term "company union" means any committee, employee representation plan or association of employees which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms and conditions of employment, which the employer has initiated or created or whose initiation or creation he has suggested, participated in or in the formulation of whose governing rules or policies or the conducting of whose management operations or elections the employer participates in or supervises or which the employer maintains, finances, controls, dominates, or assists in maintaining or financing, whether by compensating anyone for services performed in its behalf or by donating free services, equipment, materials, office or meeting space or anything else of value, or by any other means.

7. The term "unfair labor practice" means only those unfair labor practices listed in section seven hundred four.

8. The term "labor dispute" includes, but is not restricted to, any controversy between employers and em-

ployees or their representatives as defined in this section concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to negotiate, fix, maintain or change terms or conditions of employment, or concerning the violation of any of the rights granted or affirmed by this article, regardless of whether the disputants stand in the proximate relation of employer and employee.

9. The term "board" means the labor relations board created by section seven hundred two.

10. The term "policies of this article" means the policies set forth in section seven hundred.

§ 702. *Labor relations board.* 1. There is hereby created in the department of labor a board to be known as the New York state labor relations board which shall be composed of three members who shall be appointed by the governor, by and with the advice and consent of the senate. Each member of the board at the time of his appointment shall be a citizen of the United States and a resident of the state of New York, and shall have been a qualified elector in the state for a period of at least one year next preceding his appointment. No member of the board during his period of service as such shall hold any other public office. One of the original members shall be appointed for a term of two years, one for a term of four years and one for a term of six years, but their successors shall be appointed for terms of six years each, except that any individual chosen to fill a vacancy shall be appointed for the unexpired term term of the number whom he is to succeed. The governor shall designate one member to serve as chairman of the board. Any member of the board may be removed by the governor for inefficiency, neglect of duty, misconduct or malfeasance in office, and for no other cause, after being given a copy of the charges and an opportunity to be publicly heard in person or by counsel.

2. A vacancy in the board shall not impair the right of the remaining members to exercise all the powers of the board, and two members of the board shall at all times,

constitute a quorum. The board may adopt an official seal and prescribe the purposes for which it shall be used.

3. The board shall at the end of every year make a report in writing to the governor, stating in detail the work it has done in hearing and deciding cases and otherwise, and it shall sign and report in full an opinion in every case decided by it.

4. Each member of the board shall receive a salary of ten thousand dollars a year, shall devote his entire time to the duties of his office, and shall not engage in any other business, vocation or employment. The board shall appoint an executive secretary and such attorneys, trial examiners and directors for local areas and such other employees and fix such salaries or other compensation therefor, as it may from time to time find necessary for the proper performance of its duties. The reasonable and necessary traveling and other expenses of the members of the board and other officers and employees of the board, while actually engaged in the performance of their duties shall be paid from the state treasury upon the audit and warrant of the comptroller, upon vouchers approved by the chairman. Attorneys appointed under this section may, at the direction of the board, appear for and represent the board in any case in court. The board may establish or utilize such regional, local or other agencies, and utilize such voluntary and uncompensated services as may from time to time be needed. As amended L. 1945, c. 138, eff. April 1, 1945.

5. All employees of the board shall be appointed by the board in accordance with the provisions of the civil service law and rules. (As amended by Chapter 4 of the Laws of 1940.)

6. The principal office of the board shall be in the city of Albany, but it may meet and exercise any or all of its powers at any other place within the state. The board may, by one or more of its members or by such agents or agencies as it may designate, conduct in any part of this state any proceeding, hearing, investigation, inquiry, or

election necessary to the performance of its functions. A member who participates in any such proceeding shall not be disqualified from subsequently participating in a decision of the board in the same case.

7. The board shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this article including the determination of the life of the selected representatives. Such rules and regulations shall be effective upon publication in the manner which the board shall prescribe.

8. Neither the board nor any of its agents or employees shall engage in any effort to mediate, conciliate or arbitrate any labor dispute, but nothing contained in this subdivision shall be construed to prevent the board, its agents or employees, from engaging in any effort to obtain voluntary adjustments and compliance with the terms and provisions of this article and in accordance with its purposes and policy. (As amended by Chapter 126 of the Laws of 1940.)

9. Notwithstanding the provisions of any other law, neither the industrial commissioner nor any board or other agency of the department of labor shall in any way direct, review, modify or reverse any decision or finding of the board nor shall the industrial commissioner or any board or other agency of the department of labor supervise or control the board in the exercise of any powers or in the performance of any duties under this article.

§ 703. *Rights of employees.* Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with,

restrain or coerce employees in the exercise of the rights guaranteed by this section. (As amended by Chapter 773 of the Laws of 1940.)

§ 704. *Unfair labor practices.* It shall be an unfair labor practice for an employer:

1. To spy upon or keep under surveillance, whether directly or through agents or any other person, any activities of employees or their representatives in the exercise of the rights guaranteed by section seven hundred three.

2. To prepare, maintain, distribute or circulate any blacklist of individuals for the purpose of preventing any of such individuals from obtaining or retaining employment because of the exercise by such individuals of any of the rights guaranteed by section seven hundred three.

3. To dominate or interfere with the formation, existence, or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment, labor disputes or grievances, or to contribute financial or other support to any such organization, by any means, including but not limited to the following: (a) by participating or assisting in, supervising, controlling or dominating (1) the initiation or creation of any such employee organization or association, agency, or plan, or (2) the meetings, management, operation, elections, formulation or amendment of constitution, rules or policies, of any such employee organization or association, agency or plan; (b) by urging the employees to join any such employee organization or association, agency or plan for the purpose of encouraging membership in the same; (c) by compensating any employee or individual for services performed in behalf of any such employee organization or association, agency or plan, or by donating free services, equipment, materials, office or meeting space or anything else of value for the use of any such employee organization or association, agency or plan; provided that, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

4. To require an employee or one seeking employment, as a condition of employment, to join any company union or to refrain from forming, or joining or assisting a labor organization of his own choosing.

5. To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment: Provided that nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in section seven hundred five.

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

7. To refuse to discuss grievances with representatives of employees, subject to the provisions of section seven hundred five.

8. To discharge or otherwise discriminate against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this article.

9. To distribute or circulate any blacklist of individuals exercising any right created or confirmed by this article or of members of a labor organization, or to inform any person of the exercise by any individual of such right, or of the membership of any individual in a labor organization for the purpose of preventing individuals so blacklisted or so named from obtaining or retaining employment.

10. To do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by section seven hundred three.

§ 705. *Representatives and elections.* 1. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appro-

priate for such purposes or by the majority of the employees voting in an election conducted pursuant to this section shall be the exclusive representatives of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that employees directly or through representatives, shall have the right at any time to present grievances to their employer.

2. The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining. (As amended by Chapter 518 of the Laws of 1942.)

3. Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning the representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected. In any such investigation the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section seven hundred six or otherwise, and may conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either before or after the aforesaid hearing), provided, however, that the board shall not have authority to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization. (As amended by Chapter 518 of the Laws of 1942.)

4. The board shall have power to determine who may participate in the election and to establish the rules govern-

ing any such election: Provided, that no election need be directed by the board solely because of the request of an employer or of employees prompted thereto by their employer, nor shall any individuals employed only for the duration of a strike or lockout be eligible to vote in such election; and provided further, that no such election shall be conducted under the employer's supervision, or, except as may be required by the board, on the employer's property, during working hours, or with his participation or assistance. (As amended by Chapter 518 of the Laws of 1942.)

5. If at an election conducted pursuant to this section three or more nominees for exclusive collective bargaining representatives appear on the ballot and no one of them receives a majority of the votes cast at the election, the two nominees who received the highest number of votes shall appear on the ballot of a second election to be conducted hereunder, and the one receiving a majority of the votes cast at the second election shall be the exclusive representative of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

6. A labor organization nominated as the representative of employees shall be listed by name on the ballots authorized by subdivision three of this section. In any investigation conducted by the board pursuant to this section the board may make a finding as to whether any committee, employee representation plan, or association of employees involved is a company union, and if any such committee, employee representation plan, or association of employees be found to be a company union, it shall not be listed on the ballots, certified or otherwise recognized as eligible to be the representative of employees under this article.

§ 706. *Prevention of unfair labor practices.* 1. The board is empowered and directed, as hereinafter provided, to prevent any employer from engaging in any unfair labor practice. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

2. Whenever a charge has been made that any employer has engaged in or is engaging in any unfair labor practice, the board shall have power to issue and cause to be served upon such employer a complaint stating the charges in that respect and containing a notice of hearing before the board at a place therein fixed to be held not less than seven days after the serving of said complaint. Any such complaint may be amended by the board or its agent conducting the hearing at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint not less than five days after the service of such original or amended complaint and to appear in person or otherwise to give testimony at the place and time set in the complaint. In the discretion of a member or agent conducting the hearing, or of the board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the board or its agent shall not be bound by technical rules of evidence prevailing in the courts of law or equity.

3. The testimony taken at the hearing shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board upon notice may take further testimony or hear argument. If upon all the testimony taken the board shall determine that the respondent has engaged in or is engaging in any unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair labor practice, and to take such further affirmative or other action as will effectuate the policies of this article, including, but not limited to (a) withdrawal of recognition from and refraining from bargaining collectively with any employee organization, agency or plan defined in this article as a com ganization or association, agency or plan defined in this article as a company union, or established, maintained or assisted by any action defined in this article as an unfair labor practice; (b) awarding of back pay; (c) reinstatement with or without back pay of any employee discriminated against in violation of section seven hundred four, or main-

tenance of a preferential list from which such employee shall be returned to work; (d) reinstatement with or without back pay of all employees whose work has ceased or whose return to work has been delayed or prevented as the result of the aforementioned or any other unfair labor practice in respect to any employee or employees or maintenance of a preferential list from which such employees shall be returned to work. Such order may further require such person to make reports from time to time showing the extent to which the order has been complied with. If upon all the testimony the board shall be of the opinion that the person or persons named in the complaint have not engaged in or not engaging in any such unfair labor practice, then the board shall make its findings of fact and shall issue an order dismissing the complaint.

4. Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

5. The board shall not require as a condition of taking action or issuing any order under this article, that employees on strike or engaged in any other lawful, concerted activity shall discontinue such strike or such activity.

6. The board shall consider all complaints or petitions filed with it and conduct all proceedings under this article with all possible expedition.

§ 707. *Judicial review.* 1. The board shall have power to petition the supreme court of the state within the county wherein the unfair labor practice in question occurred or wherein any person charged with the unfair labor practice resides or transacts business, or if such court be on vacation or in recess, then to the supreme court of any county adjoining the county wherein the unfair labor practice in question occurred or wherein any person charged with the unfair labor practice resides or transacts business, for the enforcement of such order and for appropriate temporary relief of restraining order, and shall certify and file in the court a transcript of the

entire record in the proceeding, including the pleadings and testimony upon which such order was made and the findings and order of the board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board.

2. No objection that has not been urged before the board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, its member, agent, or agency, the court may order such additional evidence to be taken before the board, its member, agent, or agency, and to be made a part of the transcript. The board may modify its finding as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order.

3. The jurisdiction of the supreme court shall be exclusive and its judgment and decree shall be final, except that appeals shall lie to the appellate division of said court and to the court of appeals, in the manner and subject to the limitations provided in the civil practice act irrespective of the nature of the decree or judgment or the amount involved. (As amended by Chapter 210 of the Laws of 1942.)

4. Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the supreme court of the county where the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, by filing in such court a written petition praying that the order of the board be modified or set aside, or if such court be on vacation or in recess, then to the supreme court of any county adjoining the county wherein the unfair labor practice in question occurred or wherein any such person resides or transacts business. A copy of such petition shall be forthwith served upon the board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the board, including the pleading and testimony and order of the board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the board under section seven hundred six, and shall have the same exclusive jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the board; and the findings of the board as to the facts shall in like manner be conclusive.

5. The commencement of proceedings under subdivisions one and four of this section shall not, unless specifically ordered by the court, operate as a stay of the board's order.

6. When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified or setting aside in whole or in part an order of the board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by acts pertaining to equity jurisdiction of courts.

7. Petitions filed under this article shall be heard expeditiously and shall be considered and determined upon the transcript filed, without requirement of printing. Upon

the filing of a record in the supreme court, the case shall be heard with greatest possible expedition, and shall take precedence over all other matters except matters of the same character.

§ 708. *Investigatory powers.* For the purpose of all hearings and investigations, which, in the opinion of the board, are necessary and proper for the exercise of the powers vested in it by sections seven hundred five and seven hundred six.

1. The board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purposes of examination, and the right to examine, copy or photograph any evidence, including payrolls or lists of employees, of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the board, its member, agent, or agency, conducting the hearing or investigation. Any member of the board, or any agent or agency designated by the board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence.

2. If any witness resides outside of the state, or through illness or other cause is unable to testify before the board or its member, agent, or agency conducting the hearing or investigation, his or her testimony or deposition may be taken within or without this state, in such manner and in such form as the board or its member, agent or agency conducting the hearing may by special order or general rule, prescribe.

3. In case of contumacy or refusal to obey a subpoena issued to any person the supreme court of any county within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the board shall have jurisdiction to issue to such person an order requiring

such person to appear before the board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

4. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

5. Complaints, orders, and other process and papers of the board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post-office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnessess summoned before the board, its member, agent, or agency shall be paid the same fees and mileage that are paid witnesses in the courts of this state, and witnesses whose depositions are taken and the person taking the same shall severally be entitled to the same fees as are paid for like services in the courts of this state.

6. All process of any court to which application may be made under this article may be served in the county wherein the person or persons required to be served reside or may be found.

7. The several departments, commissions, divisions, authorities, boards, bureaus, agencies and officers of the state or any political subdivision or agency thereof, shall furnish the board, upon its request, all records, papers, and information in their possession relating to any matter before the board.

§ 709. *Punitive provision.* Any person who shall wilfully resist, prevent, impede, or interfere with any member of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who shall in any manner interfere with the free exercise by employees of their right to select representatives in an election directed by the board pursuant to section seven hundred and five, shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than one year, or both.

§ 710. *Public records and proceedings.* Subject to rules and regulations to be made by the board, the complaints, orders and testimony relating to a proceeding instituted by the board under section seven hundred six may be made public records and be made available for inspection or copying. All proceedings pursuant to section seven hundred and six shall be open to the public.

§ 711. *Estimate of annual administrative expenses; how paid.* Prior to the fifteenth day of November of each year, the industrial commissioner shall submit to the director of the budget for his approval an estimated budget of the administrative expenses of the New York state labor relations board for the ensuing fiscal year. All moneys appropriated to the department or the board, for the use of the board, shall be expended and audited in the manner provided for all other expenditures under the supervision of the industrial commissioner.

§ 712. *Repeal of inconsistent provisions.* Insofar as the provisions of this article are inconsistent with the provisions of any other general, special or local law, the provisions of this article shall be controlling.

§ 713. *Limitations.* Nothing in this article shall be construed so as to interfere with, impede or diminish in any way the right of employees to strike or engage in other lawful, concerted activities.

§ 714. *Separability.* If any clause, sentence, paragraph, or part of this article or the application thereof to any person or circumstances, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this article, and the application thereof to other person or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved. It is hereby declared to be the legislative intent that this article would have been adopted had such invalid provisions not been included.

§ 715. *Application of article.* The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act or to employees of the state or of any political or civil subdivision or other agency thereof, or to employees of charitable, educational or religious associations or corporations.

§ 716. *Short title.* 1. This article shall be known and may be cited and referred to as the "New York state labor relations act."

2. The sum of one hundred thousand dollars ($100,000.00), or so much thereof as may be necessary, is hereby appropriated to the department of labor out of any moneys in the state treasury not otherwise appropriated for the expenses of the New York state labor relations board, including personal service, maintenance and operation, in carrying out the provisions of article twenty of the labor law, as added by this act. Such moneys shall be payable

from the treasury on the audit and warrant of the comptroller on vouchers approved in the manner prescribed by law.

3. This act shall take effect July first, nineteen hundred thirty-seven.

APPENDIX B

SUPREME COURT, CHAUTAUQUA COUNTY

THE ALLEGHENY LUDLUM STEEL CORPORATION

against

WILLIAM J. KELLEY AND MYRON LEWIS, Constituting the State Labor Relations Board of the State of New York

Appearances: Moot, Sprague, Marcy & Gulick, Esqs., Attorneys for Plaintiffs; Welles V. Moot, Esq., William H. Eckert, Esq., and William G. Conable, Esq., of Counsel; William E. Grady, Jr., Esq., Attorney for Defendants; Philip Feldblum, Esq., and Norbert M. Phillipps, Esq., of Counsel.

Opinion

HINKLEY, *J.*:

This decision, by agreement of cousel, is not only determinative of defendants' motion to dismiss the complaint under Rules 112 and 113 of the General Rules of Practice but also of the trial of the Equity action itself. There are no disputed questions of fact but only questions of law.

Plaintiff, a Pennsylvania corporation licensed to do business in the State of New York and operating plants in various other states, seeks a declaratory judgment to restrain and enjoin the defendants as the State Labor Relations Board of the State of New York from taking steps to determine a representative of plaintiff's supervisory employees to bargain collectively with plaintiff. Prior to the bringing of the action and on December 30th, 1943, a union of national scope, known as Foreman's Association of America, Allegheny Ludlum Steel Corporation Chapter

No. 58, filed with defendants a petition seeking an investigation by defendants by virtue of Article 20 of the State Labor Law and further asking that the union be certified as the collective bargaining agent or representative of the foremen or supervisors of plaintiff's Dunkirk plant. This must not be confused with the certification by the National Labor Relations Board of the C. I. O. as bargaining agent or representative of the so-called rank and file of plaintiff's employees in the Dunkirk plant. The defendants proceeded with such investigation and while so acting this action was brought. Since the trial of the case an election has been held and a majority of eligible foremen who voted in that election chose the said Foreman's Union Chapter 58 to be their bargaining agent or representative for the purpose of collective bargaining.

Plaintiff contends that the defendants are without jurisdiction to act in the matter. This contention is based upon the fact that the plaintiff is engaged in interstate commerce and that the jurisdiction rests exclusively with the National Labor Relations Board by virtue of the National Labor Relations Act (49 Stat. 449, U. S. Code, Title 29, Chapter 7, U. S. C. A. 151). Plaintiff also contends that if the defendants have jurisdiction under ordinary circumstances that they are not authorized to receive and act upon the petition of the said Foreman's Union because of a definite policy adopted by the National Labor Relations Board decreeing that a unit composed entirely, as this one is, of foremen or those occupying a supervisory position with the Company is not an appropriate unit for collective bargaining.

Defendants contend that they are vested with jurisdiction; that they were required to act; that they are not controlled by any policy of The National Labor Relations Board, and that the Union in question is an appropriate bargaining agent for collective bargaining.

This decision would be easily arrived at were it settled by judicial decisions that The National Labor Relations Board, whether acting or not, covered the whole field of employer and employee relations in industries engaged in interstate commerce. For this plaintiff is almost exclusively engaged in interstate commerce and it cannot be

said by any stretch of the imagination that it is subject to the minimus rule. On the contrary, the law is well settled that defendants have jurisdiction to act when their acts do not conflict with those of The National Labor Relations Board or in the event that the latter Board has taken no steps to accept jurisdiction (Matter of Davega vs. City Radio, etc., 281 N. Y. 13) or unless the intention of Congress is clearly expressed that the Federal Board shall cover the entire field.

Although The National Labor Relations Board has assumed jurisdiction to certify a representative for collective bargaining between plaintiff and the rank and file of plaintiff's employees in the Dunkirk plant, The National Board has never been petitioned by the Foreman's Union involved herein nor by any other similar union or group, asking to be designated as bargaining agent or representative of the plaintiff's Dunkirk plant. Nor has The National Labor Relations Board done any act in relation to collective bargaining by the foremen or supervisors of that plant.

This brings us to the narrow question as to whether the adoption by The National Labor Relations Board of a definite policy to refuse to recognize foremen unions or groups as appropriate bargaining units is controlling upon defendants. This is not, as defendants' counsel contend, the determination by The National Labor Relations Board or the defendants of a question of fact in each individual case. It is a definite policy, broad in its scope, and based upon the definite conclusion of the National Board that such type of unions or groups are not appropriate bargaining agents and should not be recognized. If such policy is controlling upon defendants then it ousts them of any jurisdiction to act in this or any similar case. The Court, at this time, as defendants' counsel contend, is not in a position to review the action of defendants in their administrative capacity. Plaintiff must stand or fall upon its claim that, by reason of a declared policy of a superior board, the defendants are without jurisdiction to act in this case. If defendants are without jurisdiction to act, then there is ample authority for a declaratory judgment. (Section 473, C. P. A.' Dun & Bradstreet, Inc. vs. City of New York,

276 N. Y., 198. Bank of Yorktown vs. N. Y. S. L. R. B., 280 N Y., 673.)

That there is a sharp conflict between the policy of The National Labor Relations Board and that of the defendants is most clear. The view taken by The National Labor Relations Board that it will not lend itself to collective bargaining by foremen unions or groups is clear shown by its language in the Maryland Drydock cases (49 N. L. R. B., 733) and other of its decisions and in the letter of the regional director attached to defendants' moving papers. That the defendants take the opposite view and feel in duty bound to aid foremen unions or groups in collective bargaining is shown by their decision No. 2751 in this case, which decision is attached to defendants' answer.

The Court is not called upon nor does it desire to express its opinion of the logic or reasoning or right or wrong of the conflict of policy of the Federal and State Labor Relations Boards. In the absence of a definite intent of statutory regulation and in the further absence of judicial precedent, the Court cannot properly decree that in this instance the defendants are without jurisdiction to act simply because The National Labor Relations Board would not act under similar circumstances. Nor can the plaintiff arbitrarily refuse to recognize the State Labor Relations Board because it disagrees with the policy of that Board. Under the circumstances of this case, the plaintiff is called upon to co-operate to the fullest extent with the New York State Labor Relations Board and the certified representative of the foreman group or union until such time, if it arises, that the defendants are ousted from jurisdiction by The National Labor Relations Board.

The Court cannot read into the legislation upon labor relations any intent upon the part of Congress to cover the whole field of employer and employee relations in industrial plants engaged in interstate commerce by the act of Congress in creating The National Labor Relations Board. If so, then state action would be precluded. (Napier vs. Atlantic Coast Line, 272 U. S. 605, at 613: Oregon-Washington R. & N. Co. vs. Washington, 270 U. S. 87.) Congress cannot be held to have intended to supersede or suspend the exercise of reserved powers of a State, even when that may be

done, unless and except so far as its purpose to do so is clearly manifested. (Illinois Central R. Co. vs. Public Utilities Com., 245 U. S. 493, 510. Approved in Welch Co. vs. New Hampshire, 306 U. S. 79, 85.)

Here we have, in the language of Chief Justice Stone (Cloverleaf vs. Patterson, 315 U. S. 148 at 170 dissenting opinion) an unexercised discretionary power given by Congress to a Federal Board as a means of regulating interstate commerce, when the full exercise of its authority would conflict with an assertion of the State power. But only in a case where the intention of Congress to give to the Federal Board exclusive control over the entire field is clearly manifested can the power of the State to act be superseded. (N. W. Bell Tel. Co. vs. Ry. Commission, 297 U. S. 471.) In the absence of such clear intention, it cannot be said that the failure of the Federal Board to exercise its full power is in effect a controlling administrative ruling that no further regulation by either Federal or State government is proper or needful.

It follows that defendants' motion to dismiss the plaintiff's complaint under Rules 112 and 113 must be granted and judgment entered in favor of defendants dismissing plaintiff's complaint upon the merits and not as matter of discretion.

Order and judgment may be entered in accordance with this decision, with opportunity to counsel to file requests to find and conclusions of law, if such intention is indicated within a reasonable time.

ALONZO G. HINKLEY,
Justice Supreme Court.

July 27th, 1944.